COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0109-CR **Cir. Ct. No. 01CF000148**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN J. LEITERITZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Brian J. Leiteritz appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. The issue on appeal is whether the circuit court erred when it refused to allow Leiteritz to withdraw his plea. Because we conclude that the circuit court did not err, we affirm.

¶2 Leiteritz was convicted of homicide by intoxicated use of a motor vehicle for the death of a passenger in his car. At the time of the accident in August 2001, Leiteritz was driving a 1987 car which he had purchased just a few days before. The accident occurred when Leiteritz and the victim were driving from a wedding reception at which Leiteritz had been drinking pitchers of beer. Leiteritz drove through a stop sign at a "T" intersection and struck a tree. Before entering a plea of guilty to the charge, Leiteritz's counsel had a mechanic inspect the car. This mechanic reported that the vehicle was in good working order. The next day, Leiteritz pled guilty to the charge.

¶3 Before sentencing, but after receiving the presentence investigation report with a recommended sentence, Leiteritz moved to withdraw his plea. With new counsel, he had a different mechanic inspect the car. This mechanic found that only the right front brakes on the car worked. At the postconviction hearing, Leiteritz testified that he was told when buying the car that the brakes needed work, and that the car was sold to him in "as is" condition, for parts only. He also testified that he knew the car pulled to the right when he applied the brakes. Leiteritz argued that he would not have pled guilty if he had known about the second mechanic's report and that this created a fair and just reason for him to be allowed to withdraw his plea.

¶4 The circuit court denied the motion. The court found that Leiteritz had not shown that this death would have occurred even if he had been exercising due care and had not been under the influence of an intoxicant. The court found that Leiteritz should have been aware of the stop sign at the intersection where the accident took place, and should have been able to stop. Further, the court found that Leiteritz had not offered any evidence that he attempted to apply the brakes before the accident. In the absence of this evidence, the court found that evidence

about the condition of the brakes was irrelevant. After denying the motion, the court sentenced Leiteritz to a term of twelve years, with seven years of initial confinement and five years of extended supervision.

¶5 After sentencing, and with new postconviction counsel, Leiteritz again moved to withdraw his plea. Leiteritz alleged that he had received ineffective assistance of trial counsel during the plea proceedings because counsel had told him that he would be able to withdraw his plea if he later found a stronger defense. The court denied this motion without a hearing, finding that Leiteritz had not presented anything in this second motion which the court had not already considered. Leiteritz appeals.

¶6 Leiteritz now argues that he should be allowed to withdraw his plea because he decided to plead guilty based on incorrect information, he moved to withdraw his plea before sentencing, and the State would not be prejudiced by allowing him to withdraw his plea. A defendant should be allowed to withdraw a guilty plea before sentencing for any fair and just reason unless the prosecution would be substantially prejudiced. *See* ***State v. Canedy***, 161 Wis. 2d 565, 582-83, 469 N.W.2d 163 (1991). Withdrawal of a guilty plea before sentencing is not an absolute right, but the fair and just reason standard contemplates the showing of some adequate reason for the defendant's change of heart. ***Id.*** at 583. The burden is on the defendant to offer a fair and just reason for the withdrawal of the plea. ***Id.*** at 583-84. We review the circuit court's decision to deny the motion to withdraw his plea under the erroneous exercise of discretion standard. ***Id.*** at 579.

¶7 Leiteritz is arguing, in essence, that he should be allowed to withdraw his plea because of newly discovered evidence. The State argues that the evidence is not newly discovered but rather is the newly discovered

importance of existing evidence. We will assume, without deciding, that the evidence of the condition of the brakes in the car was newly discovered. We still conclude, however, that the court properly denied Leiteritz's motion for plea withdrawal because Leiteritz was not diligent in pursuing the evidence and the evidence was not material.

¶8 New evidence may constitute a fair and just reason for plea withdrawal when a defendant shows by a preponderance of the evidence that: "(1) the evidence was discovered after entry of the plea; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***State v. Kivioja***, 225 Wis. 2d 271, 294, 592 N.W.2d 220 (1999). We conclude that Leiteritz should have been more diligent in obtaining a second opinion about the condition of the brakes. Leiteritz testified that he noticed when driving the car that the car pulled slightly to the right when he applied the brakes, and that the seller had told him that the brakes needed work. Further, Leiteritz agreed to buy the car from the seller in an as is condition, for parts only. Knowing this about the car's condition, Leiteritz should have been more diligent in obtaining a second opinion once the first mechanic said the car was fine.

¶9 Further, we agree with the trial court's conclusion that this evidence was not relevant. A defendant has an affirmative defense to homicide by intoxicated use of a motor vehicle if the defendant can establish that the death would have occurred if he or she had been exercising due care and he or she had not been under the influence of an intoxicant. WIS. STAT. § 940.09(2) (2001-02). We conclude that the affirmative defense would not have been available to Leiteritz based on the evidence presented at the hearing.

¶10 First, the evidence of the accident established that there were signs posted on the highway warning of curves and the impending stop sign. Further, Leiteritz testified that he had driven the car before at the same speed and still been able to stop it. Nonetheless, Leiteritz drove straight through the stop sign at the intersection and into a tree. As the circuit court found, it would be difficult to conclude that Leiteritz had exercised due care in slowing down and stopping under these facts.

¶11 Moreover, before the hearing on the presentence motion to withdraw his plea, the court noted its concern that Leiteritz had not testified that he applied the brakes. Even with this concern expressed, Leiteritz did not offer any evidence at the hearing that he applied the brakes. Without any evidence that he applied the brakes, the condition of the brakes was totally irrelevant. Under all of these circumstances, we agree with the circuit court that the condition of the car's brakes was simply not material.

¶12 Leiteritz also argues that he received ineffective assistance of trial counsel because he says his counsel told him he would be able to withdraw his plea if something new turned up. The State argues that Leiteritz has waived this claim because he did not develop the issue in his brief-in-chief before this court. Arguments raised but not briefed or argued are deemed abandoned by this court. ***Post v. Schwall***, 157 Wis. 2d 652, 657, 460 N.W.2d 794 (Ct. App. 1990). Further, we will not, as a general rule, consider issues raised by an appellant for the first time in a reply brief. ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981). Leiteritz argues that this issue was not "flushed out" because the circuit court refused to grant him a hearing on the issue when he raised it in a postconviction motion. While this may explain why the circuit court did not thoroughly address the issue, it does not explain why the issue was not

addressed in the appellant's main brief. This was Leiteritz's opportunity to explain, with citation to legal authority, why the circuit court erred when it refused to hold that hearing. Because Leiteritz did not address the issue in his brief-in-chief, we decline to address it now. For the reasons stated, the judgment and order of the circuit court are affirmed.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.